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SECOND AMENDMENT MINIMALISM: *HELLER* AS *GRISWOLD*

Cass R. Sunstein*

I. INTRODUCTION

*District of Columbia v. Heller*¹ is the most explicitly and self-consciously originalist opinion in the history of the Supreme Court.² Well over two hundred years since the Framing, the Court has, for essentially the first time, interpreted a constitutional provision with explicit, careful, and detailed reference to its original public meaning.³

It would be possible, in this light, to see *Heller* as a modern incarnation of *Marbury v. Madison*,⁴ at least as that case is understood by some contemporary scholars,⁵ and to a considerable extent as Chief Justice John Marshall wrote it. In *Marbury*, the Court also spoke on behalf of what it took to be the text, structure, and original meaning of the Constitution.⁶ On one view, *Heller* represents the full flowering of the approach that Chief Justice Marshall imperfectly inaugurated — one that has been abandoned at crucial periods in American history. To its defenders, *Heller* speaks honestly and neutrally on behalf of the original meaning, and it should be appreciated and applauded for that reason.⁷

But there is a radically different reading of *Heller*. The constitutional text is ambiguous, and many historians believe that the Second Amendment does not, in fact, create a right to use guns for nonmilitary

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¹ 128 S. Ct. 2783 (2008).

² Of course, there are other candidates. See, e.g., *Printz v. United States*, 521 U.S. 898 (1997); *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211 (1995). It is important to note as well that the *Heller* Court embraced a particular species of originalism, one that emphasizes the “original public meaning” of the Constitution rather than the “original intention” of its authors.

³ I do not mean to suggest that the Court was correct on the historical issue, a question explored below at pp. 255–57.

⁴ 5 U.S. (1 Cranch) 137 (1803).

⁵ See, e.g., ROBERT LOWRY CLINTON, *MARBURY V. MADISON AND JUDICIAL REVIEW* (1989).

⁶ 5 U.S. (1 Cranch) at 173–80.

⁷ For an early statement to this effect, see Randy E. Barnett, *News Flash: The Constitution Means What It Says*, WALL ST. J., June 27, 2008, at A13.

purposes.⁸ In their view, the Court's reading is untrue to the relevant materials. If they are right, then it is tempting to understand *Heller* not as *Marbury* but as a modern incarnation of *Lochner v. New York*,⁹ in which the Court overrode democratic judgments in favor of a dubious understanding of the Constitution. On this view, it is no accident that the five-Justice majority in *Heller* consisted of the most conservative members of the Court (who were all Republican appointees). Perhaps *Heller* is, in the relevant sense, a twenty-first-century version of *Lochner*-style substantive due process, and perhaps it marks the beginning of a long series of confrontations between the Supreme Court and the political branches.

On a third view, this characterization badly misses the mark. *Heller* is more properly characterized as a rerun of the minimalist ruling in *Griswold v. Connecticut*.¹⁰ In *Griswold*, the Court struck down a Connecticut law banning the use of contraceptives by married couples, under circumstances in which the Connecticut law was plainly inconsistent with a national consensus. The Court worked hard to support its decision by reference to the standard legal materials,¹¹ but the national consensus probably provides the best explanation of what the Court did.¹² Perhaps *Heller* is closely analogous. The Court spoke confidently in terms of the original meaning, but perhaps its ruling is impossible to understand without attending to contemporary values, and in particular to the fact that the provisions that the Court invalidated were national outliers.

In this Comment, I contend that the third view is largely correct, and that *Heller* will, in the fullness of time, be seen as embracing a kind of Second Amendment minimalism. Notwithstanding the Court's preoccupation with constitutional text and history, *Heller* cannot be adequately understood as an effort to channel the document's original public meaning. The Court may have been wrong on that issue, and even if it was right, a further question remains: why was the robust individual right to possess guns recognized in 2008, rather than 1958, 1968, 1978, 1988, or 1998? And notwithstanding the possible inclinations of the Court's most conservative members, *Heller* is not best seen as a descendent of *Lochner*. In spite of its radically different method-

⁸ See, e.g., SAUL CORNELL, *A WELL-REGULATED MILITIA: THE FOUNDING FATHERS AND THE ORIGINS OF GUN CONTROL IN AMERICA* (2006); Jack N. Rakove, *The Second Amendment: The Highest Stage of Originalism*, 76 CHI.-KENT L. REV. 103, 158 (2000). See also the ambivalent treatment, showing that there are plausible views on both sides, in MARK V. TUSHNET, *OUT OF RANGE: WHY THE CONSTITUTION CAN'T END THE BATTLE OVER GUNS* (2007).

⁹ 198 U.S. 45 (1905).

¹⁰ 381 U.S. 479 (1965).

¹¹ *Id.* at 484–85.

¹² See RICHARD A. POSNER, *SEX AND REASON* 328–29 (1992).

ology, *Heller* is far closer to *Griswold* than it is to *Marbury* or to *Lochner*.

No less than *Griswold*, *Heller* is a narrow ruling with strong minimalist features. And if this view is correct, then the development of the gun right, as it is specified over time, will have close parallels to the development of the privacy right. As the law emerges through case-by-case judgments, the scope of the right will have as much to do with contemporary understandings as with historical ones. This point has general implications for constitutional change in the United States, even when the Court contends, in good faith, that it is merely channeling the original meaning or other established sources of constitutional meaning.

II. *HELLER* AS *MARBURY*

A. *Original Meaning and Blank Slates*

For many years, Justice Scalia has contended that the Constitution should be interpreted so as to fit with the original public meaning of the relevant provisions.¹³ In his view, the judge's duty is to track that meaning, not to take account of changing circumstances or new moral commitments. What Justice Scalia seeks is "a rock-solid, unchanging Constitution."¹⁴ His interest in originalism is explicitly connected with his interest in rule-bound law and in constraining judicial discretion; on his account, originalism is uniquely capable of ensuring that constitutional law is not a matter of judicial will or ad hoc, case-by-case judgments.¹⁵ Indeed, originalism and rule-bound law help to protect liberties by stiffening the judicial spine, ensuring respect for constitutional rights even when the political pressure is intense.¹⁶ It is in part because of his enthusiasm for rule-bound law that Justice Scalia rejects the original intention in favor of the original meaning.¹⁷ To assess intentions, courts need to ask something subjective, involving what lies inside particular people's heads; to ask about meaning, courts can undertake a more objective inquiry.

¹³ See, e.g., Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, in A MATTER OF INTERPRETATION: FEDERAL COURTS AND THE LAW 3 (Amy Guttmann ed., 1997) [hereinafter Scalia, *Common-Law Courts in a Civil-Law System*]; Antonin Scalia, *Originalism: The Lesser Evil*, 57 U. CIN. L. REV. 849 (1989).

¹⁴ Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 13, at 47.

¹⁵ See Antonin Scalia, *The Rule of Law As a Law of Rules*, 56 U. CHI. L. REV. 1175 (1989).

¹⁶ See *id.* at 1180. There is a clear connection between this claim and the Court's rejection of interest-balancing in *Heller*. See 128 S. Ct. at 2821 (citing *id.* at 2852 (Breyer, J., dissenting)).

¹⁷ Scalia, *Common-Law Courts in a Civil-Law System*, *supra* note 13, at 38.

Notwithstanding the energy and clarity with which Justice Scalia has argued for his approach, *Heller* is unique; he has never been able to embed originalism so explicitly and directly in a majority opinion.¹⁸ On the contrary, originalism has not been a significant theme on either the Rehnquist Court or the Roberts Court.¹⁹ For this reason, it is stunning to see that *Heller* is a thoroughly originalist opinion — a significant development, and one that is at least potentially important for the future, certainly of the Second Amendment, and perhaps more generally.

To be sure, the Court's originalism is less surprising here than it would be in other domains. In the Second Amendment context, the Court had sparse precedents²⁰ with which to work; the cases were neither recent nor carefully reasoned, and it was clear that the Court did not much like what it found.²¹ In a sense, the question in *Heller* was one of first impression, or at least it could be so taken. In answering that question, many judges might be drawn to the original understanding even if they would not consider it, or would not give it a great deal of weight, if they were writing on an unclean slate.

But we should be careful about this point, for it is hardly inevitable that the Court would be drawn to originalism even when it lacked doctrinal signposts. After all, circumstances have changed dramatically since the ratification of the Second Amendment, making it tempting to follow the text but not the original meaning. The twenty-first-century United States is radically different from the eighteenth-century United States, in a way that seems to complicate and perhaps even to confound any form of originalism.²² Compare the First Amendment: in approaching the meaning of that amendment in the context of commercial advertising, the Court did not ask about the original understanding, even though the precedents were sparse in that domain as well.²³ In its first serious encounter with the question of affirmative action, the Court's members spent essentially no time with the original

¹⁸ In some cases, however, there have been unmistakable originalist features. See, e.g., *Crawford v. Washington*, 541 U.S. 36, 42–43 (2004). For a valuable discussion, see Stephanos Bibas, *Originalism and Formalism in Criminal Procedure: The Triumph of Justice Scalia, the Unlikely Friend of Criminal Defendants?*, 94 GEO. L.J. 183, 201 (2005).

¹⁹ See, e.g., *Hein v. Freedom From Religion Found., Inc.*, 127 S. Ct. 2553 (2007) (nonoriginalist opinion by Justice Alito); *Lucas v. S.C. Coastal Council*, 505 U.S. 1003 (1992) (nonoriginalist opinion by Justice Scalia); *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992) (same).

²⁰ See, e.g., *United States v. Miller*, 307 U.S. 174 (1939); *United States v. Cruikshank*, 92 U.S. 542 (1876).

²¹ *Heller*, 128 S. Ct. at 2814–15.

²² See CORNELL, *supra* note 8; Rakove, *supra* note 8, at 158.

²³ See *Va. State Bd. of Pharmacy v. Va. Citizens Consumer Council*, 425 U.S. 748 (1976).

meaning of the Equal Protection Clause.²⁴ The same is true of the pivotal cases involving discrimination on the basis of sex.²⁵ The Court's decisions involving sexually explicit materials were not originalist, even when the Court had few precedents with which to work.²⁶ In its first real encounter with the legitimacy of congressional grants of standing to citizens as such, the Court decided to invalidate such grants — and without saying even a word about the original understanding.²⁷ Originalism seems to have more appeal when doctrine is not developed, but the Court has rarely spoken in originalist terms even when doctrine barely exists.²⁸

Moreover, judges who believe in some kind of “moral reading” of the Constitution might attempt to make best moral sense of the relevant provision, rather than to track the understandings of over two centuries ago.²⁹ What is noteworthy is that no opinion in *Heller* approached the constitutional question in these terms, at least not explicitly. Justice Scalia's thoroughly originalist opinion commanded a majority of the Court, and Justice Scalia's distinctive brand of originalism, involving the original public meaning, was clearly ascendant. Indeed, the dissenters spoke in largely originalist terms as well, although Justice Breyer's plea for balancing had pragmatic as well as originalist elements.³⁰

B. Marbury, Originalism, and Timing

Taken as a full-scale vindication of originalist methodology, *Heller* has few clear precedents,³¹ even in the Founding era.³² An imperfect

²⁴ See *Regents of the Univ. of Cal. v. Bakke*, 438 U.S. 265 (1978). For a detailed argument that affirmative action is unobjectionable on originalist grounds, see Eric Schnapper, *Affirmative Action and the Legislative History of the Fourteenth Amendment*, 71 VA. L. REV. 753 (1985).

²⁵ See, e.g., *Califano v. Goldfarb*, 430 U.S. 199 (1977); *Reed v. Reed*, 404 U.S. 71 (1971).

²⁶ See, e.g., *Roth v. United States*, 354 U.S. 476 (1957).

²⁷ See *Lujan v. Defenders of Wildlife*, 504 U.S. 555 (1992). For a critique on originalist grounds, see Cass R. Sunstein, *What's Standing After Lujan? Of Citizen Suits, "Injuries," and Article III*, 91 MICH. L. REV. 163 (1992).

²⁸ For an illuminating discussion, see Adam M. Samaha, *Originalism's Expiration Date*, 30 CARDOZO L. REV. (forthcoming 2008).

²⁹ See RONALD DWORKIN, *FREEDOM'S LAW: THE MORAL READING OF THE AMERICAN CONSTITUTION* 7–15 (1996).

³⁰ See *Heller*, 128 S. Ct. at 2851–53 (Breyer, J., dissenting). Note that Justice Stevens also emphasized judicial precedents, *id.* at 2823 (Stevens, J., dissenting), longstanding traditions, *id.* at 2842–45, and the need for judicial deference to reasonable legislative judgments, *id.* at 2846–47, 2846 n.39.

³¹ But see *supra* note 2.

³² The Court's clearest embrace of originalism, in its first century, can be found in *Dred Scott v. Sandford*, 60 U.S. (19 How.) 393, 405 (1857):

It is not the province of the court to decide upon the justice or injustice, the policy or impolicy, of these laws. The decision of that question belonged to the political or law-making power; to those who formed the sovereignty and framed the Constitution. The duty of the court is, to interpret the instrument they have framed, with the best lights we

but highly salient analogy is *Marbury*.³³ In recognizing the power of judicial review, Chief Justice Marshall placed a great deal of emphasis on the constitutional text and structure.³⁴ True, he did not speak directly in terms of the original public meaning. But some of the foundations of his approach were textualist, with his emphasis on the Supremacy Clause and the judicial oath.³⁵ Indeed, it would not be implausible to say that he was attempting to channel the original understanding of the text. Some modern defenses of *Marbury* contend that the Court's conclusion was fully consistent with originalist methodology.³⁶ *Marbury* could easily have been written in originalist terms, and any such opinion would overlap with Chief Justice Marshall's own.

I do not mean to say anything controversial about *Marbury* here. But perhaps *Heller* represents a far more thorough, careful, and sophisticated version of *Marbury*'s approach — one that, well over two hundred years since the Founding, attempts humbly and faithfully to recover and to implement the original judgment of We the People.³⁷ In seeing *Heller* as *Marbury*, then, I am taking *Marbury* to be a reasonable rendering of that original judgment, in a case that has unique salience in the canon of constitutional law.

This understanding of *Heller* is not at all implausible. The Court's reading of text and history was hardly preposterous;³⁸ whether or not the Court's analysis was convincing,³⁹ it grappled with textual and historical arguments on all sides. But as a full account of what the Court

can obtain on the subject, and to administer it as we find it, according to its true intent and meaning when it was adopted.

Note that in *Dred Scott*, the Court spoke in terms of original intentions, as well as original public meaning.

³³ For an illuminating discussion of *Marbury*, with close reference to its context, see BRUCE ACKERMAN, *THE FAILURE OF THE FOUNDING FATHERS: JEFFERSON, MARSHALL, AND THE RISE OF PRESIDENTIAL DEMOCRACY 182–88* (2005).

³⁴ *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 180 (1803) (“Thus, the particular phraseology of the constitution of the United States confirms and strengthens the principle, supposed to be essential to all written constitutions, that a law repugnant to the constitution is void; and that courts, as well as other departments, are bound by that instrument.”).

³⁵ *Id.*

³⁶ See CLINTON, *supra* note 5. For a very different understanding, see ACKERMAN, *supra* note 33, at 264–65.

³⁷ For a brief suggestion to this effect, see Barnett, *supra* note 7.

³⁸ See TUSHNET, *supra* note 8, at xv–xvi (suggesting that while the question is close, the original understanding is best read to create an individual right to have guns for nonmilitary purposes).

³⁹ For some doubts on that score from one of the leading historians of the Founding period, see Posting of Jack Rakove to Balkinization, <http://balkin.blogspot.com/2008/06/thoughts-on-heller-from-real-historian.html> (June 27, 2008, 20:02).

did, the understanding runs into two serious problems.⁴⁰ The first is that the original meaning of the Second Amendment is greatly contested and many historians reject the Court's conclusion — an issue to which I will shortly turn.

The second problem is less straightforward but more interesting and equally fundamental: Even if the Court's understanding of the original public meaning is correct, why did the Court vindicate that understanding in 2008? Why not in 1958, 1968, 1978, 1988, or 1998? Between 1942⁴¹ and 2001,⁴² lower courts had been virtually unanimous in rejecting the view that the Second Amendment creates an individual right to use guns for nonmilitary purposes. A quiz question: when was the first time a lower federal court invoked the Second Amendment to invalidate a state or federal law? Answer: *Heller* itself, in 2007.⁴³ In well over a half-century, the Court had many opportunities to reject the established view within the lower federal courts; it never did so. Indeed, for many decades, no member of the Court showed the slightest inclination to hold that the Second Amendment protects the right to have a gun for nonmilitary uses. Why did the Court accept that view in 2008?

The answer has everything to do with the particular context in which the *Heller* Court wrote — the context that led the Court to be composed as it was and to have the inclinations that it did. In terms of judicial as well as public convictions, it would be a mistake to underestimate the influence of a powerful and aggressive social movement promoting public and judicial recognition of an individual right to have guns for nonmilitary purposes.⁴⁴ In part as a result of the immense influence of that movement, strong national majorities have come to favor that right.⁴⁵ Indeed, national opposition to a ban on handguns has been larger and more consistent in recent years than in the 1950s, 1960s, 1970s, and 1980s.⁴⁶ Politicians of both parties

⁴⁰ I put to one side some conceptual issues with attempting the originalist project under changed circumstances. See CASS R. SUNSTEIN, *RADICALS IN ROBES: WHY EXTREME RIGHT-WING COURTS ARE WRONG FOR AMERICA* 68–71 (2005).

⁴¹ *Cases v. United States*, 131 F.2d 916 (1st Cir. 1942).

⁴² *United States v. Emerson*, 270 F.3d 203 (5th Cir. 2001).

⁴³ *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007), *aff'd sub nom.*, *Heller*, 128 S. Ct. 2783 (2008).

⁴⁴ See Reva B. Siegel, *The Supreme Court, 2007 Term—Comment: Dead or Alive: Originalism As Popular Constitutionalism in Heller*, 122 HARV. L. REV. 191 (2008).

⁴⁵ See PollingReport.com, *Guns*, <http://pollingreport.com/guns.htm> (last visited Oct. 5, 2008); see also Jeffrey M. Jones, *Public Believes Americans Have Right To Own Guns*, GALLUP, Mar. 27, 2008, <http://www.gallup.com/poll/105721/Public-Believes-Americans-Right-Own-Guns.aspx>.

⁴⁶ Gallup Poll Editorial Staff, *Gallup Summary: Americans and Gun Control*, GALLUP, Apr. 18, 2007, <http://www.gallup.com/poll/27229/Gallup-Summary-Americans-Gun-Control.aspx>.

strongly favor some kind of individual right to have guns,⁴⁷ and the central holding of *Heller* is thus fully consistent with the view of national leaders as well as that of most citizens. It is highly revealing in this regard that majorities of both houses of Congress supported a robust individual right in an amicus brief⁴⁸ and that both nominees for the presidency — John McCain and Barack Obama — greeted *Heller* with general enthusiasm.⁴⁹

Indeed, judicial rejection of an individual right to have guns for nonmilitary purposes would have produced a high degree of public outrage, thus making the Court, and its rejection of that right, a salient part of national politics. Any ruling against an individual right to have guns for purposes of self-defense and hunting would have been wildly unpopular. Such a ruling would have polarized the nation. By contrast, *Heller* itself was met with widespread social approval. Far from creating a firestorm, it was mostly met with reactions ranging from relative indifference to enthusiasm.

Of course, the Court does not merely channel public opinion, and hence it is necessary to identify mechanisms that would link the Court's recognition of a robust individual right to a period in which most people support that right.⁵⁰ It is surely relevant here that the Court's composition is determined by the views of the President (and, through the power to advise and consent, the Senate), and the Republican Presidents who appointed the five-member *Heller* majority were strong supporters of a broad Second Amendment right.⁵¹ The fact that in 2008, the Court was willing to read the Constitution so as to

⁴⁷ Brief for Amici Curiae 55 Members of United States Senate et al. in Support of Respondent, *Heller* (No. 07-290), available at http://supreme.lp.findlaw.com/supreme_court/briefs/07-290/07-290.mer.ami.resp.cong.pdf.

⁴⁸ *Id.*

⁴⁹ Senator McCain responded as follows: "Today's decision is a landmark victory for Second Amendment freedom in the United States. . . . I applaud this decision as well as the overturning of the District of Columbia's ban on handguns and limitations on the ability to use firearms for self-defense." Posting of Tom Bevan to Real Clear Politics, http://time-blog.com/real_clear_politics/2008/06/mccain_reacts_to_sctus_gun_de.html (June 26, 2008). Senator Obama stated: "I have always believed that the Second Amendment protects the right of individuals to bear arms Today's ruling, the first clear statement on this issue in 127 years, will provide much-needed guidance to local jurisdictions across the country. As President, I will uphold the constitutional rights of law-abiding gun-owners, hunters, and sportsmen." *Id.*

⁵⁰ For one account, see EDWARD H. LEVI, AN INTRODUCTION TO LEGAL REASONING 3–6 (1949).

⁵¹ Ronald Reagan was a member of the National Rifle Association, and he was committed to a broad individual right to have guns. See Chris Cox's Political Report — Ronald Wilson Reagan, www.nraila.org/issues/Articles/Read.aspx?ID=140 (last visited Oct. 5, 2008). George H.W. Bush was also an NRA member for decades, although he resigned his membership in 1995. See John Minz, *Bush Resigns From NRA, Citing 'Broadside' on Agents*, WASH. POST, May 11, 1995, at A1. George W. Bush has been strongly committed to a broad individual right. See *NRA Endorses George W. Bush for President*, NRA POLITICAL VICTORY FUND, Oct. 13, 2004, www.nrapvf.org/News/Read.aspx?ID=4614 (last visited Oct. 5, 2008).

safeguard that right had everything to do with the social and political context in which the Court wrote.

In short, I am suggesting that even if *Heller* accurately captured the original meaning, the Court's willingness to do so cannot be explained in terms that point only to historical accuracy. In any number of areas — affirmative action, sex equality, property rights, commercial advertising, standing to sue — the Court could choose, but has not chosen, to be originalist. We also need to ask: *Why originalism now, in particular? Why originalism here, in particular?* The most sensible answers point to context and culture, and both of these strongly favored the Court's conclusion.

III. *HELLER* AS *LOCHNER*

In *Lochner v. New York*, the Court struck down a maximum hour law.⁵² The Court reasoned that freedom of contract is part of the "liberty" protected by the Due Process Clause, and it found that the state's police power did not extend to maximum hour regulation, which could not be justified as either a labor law or a health law.⁵³ In so ruling, the Court attempted, in good faith, to justify its conclusion by reference to the standard legal materials.⁵⁴ There is no reason to doubt that the Court's members genuinely believed that the legal sources justified their conclusion. But it is now widely agreed that *Lochner* was a mistake and even a disgrace, because the Court could not claim adequate legal support for its conclusion and actually entrenched its own, controversial view of public policy.⁵⁵ The general problem with the *Lochner* decision, thus understood, is captured in Justice Holmes' dissenting suggestion that "[t]he Fourteenth Amendment does not enact Mr. Herbert Spencer's Social Statics."⁵⁶ After *Heller*, does the Constitution enact the latest position paper of the National Rifle Association? The conclusions of the Republican Party on gun control?

At first glance, it seems reckless and insulting to ask such questions or to see *Heller* as a modern incarnation of *Lochner*, because the Court took such pains to attempt to justify its approach by reference to constitutional text, structure, and history. But Judge J. Harvie Wilkinson has objected that *Heller* suffers from the same defects as *Roe v. Wade*,⁵⁷ in an analysis that links *Heller* with *Lochner* as

⁵² *Lochner v. New York*, 198 U.S. 45, 64 (1905).

⁵³ *Id.* at 57–58.

⁵⁴ *Id.* at 54–56.

⁵⁵ For the Court's own recognition of this point, see, for example, *Ferguson v. Skrupa*, 372 U.S. 726, 728–29 (1963). For one discussion of the problems with the Court's entrenching its own policy views, see RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* (1977).

⁵⁶ 198 U.S. at 75 (Holmes, J., dissenting).

⁵⁷ 410 U.S. 113 (1973).

well.⁵⁸ In his view, the *Heller* Court allowed litigants to “bypass the ballot and seek to press their political agenda in the courts.”⁵⁹ Rejecting this approach, Judge Wilkinson explicitly invokes Justice Holmes’ dissenting opinion in *Lochner*.⁶⁰

To know whether it is plausible to see *Heller* as *Lochner*, we need to know what the claim of analogy is meant to assert.⁶¹ On one view, which should be congenial to those who approve of *Heller*, the vice of *Lochner* consisted in a departure from the original meaning of the relevant text. On a different view, the vice of *Lochner* consisted in invalidation of a statute when the constitutional text was ambiguous. Of course, there are other possibilities, most prominently the view that the vice of *Lochner* consisted in an aggressive judicial posture in a context in which there was no particular reason to think that the democratic process was malfunctioning.

A. Originalism and *Lochnerism*

The *Heller* Court purported to be originalist, but many historians have concluded and even insisted that the Second Amendment did not create an individual right to use guns for nonmilitary purposes. On this view, the understanding enshrined in *Heller* is a product of the nation’s most recent decades, not the Founding period.

In one of the most elaborate and detailed studies, Saul Cornell concludes that the Second Amendment right did not extend to nonmilitary uses of guns.⁶² He finds, for example, that the right did not cover the use of guns for purposes of hunting; in his account, the suggestion that it did cover such use was expressed on only one isolated occasion in the Founding era, and even that reference, in a dissent in the Pennsylvania ratifying convention, was obscure.⁶³ More generally, Cornell concludes that the “original understanding of the Second Amendment was neither an individual right of self-defense nor a collective right of the states, but rather a civic right that guaranteed that citizens would be able to keep and bear those arms needed to meet their legal obligation to participate in a well-regulated militia.”⁶⁴ In Cornell’s view, the

⁵⁸ See J. Harvie Wilkinson III, *Of Guns, Abortions, and the Unraveling Rule of Law*, 95 VA. L. REV. (forthcoming Apr. 2009) (manuscript on file with the Harvard Law School Library).

⁵⁹ *Id.* (manuscript at 1).

⁶⁰ *Id.* (manuscript at 2–3).

⁶¹ There are many different accounts of the vice of *Lochner*; I emphasize conventional ones here. For discussion of what might be wrong with *Lochner*, see JOHN HART ELY, *DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW* 14–15 (1980); David A. Strauss, *Why Was Lochner Wrong?*, 70 U. CHI. L. REV. 373 (2003); and Cass R. Sunstein, *Lochner’s Legacy*, 87 COLUM. L. REV. 873 (1987).

⁶² CORNELL, *supra* note 8.

⁶³ *Id.* at 51–52.

⁶⁴ *Id.* at 2.

understanding endorsed in *Heller* is simply wrong; the Second Amendment, as originally understood, did not create a right to have guns for nonmilitary purposes.

Similarly, Jack Rakove, a Pulitzer Prize winner and one of the most careful students of the period, concludes that the purpose of the Second Amendment was merely to affirm “the essential proposition — or commonplace — that liberty fared better when republican polities relied upon a militia of citizen soldiers for their defense, rather than risk the dire consequences of sustaining a permanent military establishment.”⁶⁵ Rakove believes that the Second Amendment must be understood in the context of the effort to preserve state militias; he rejects a broader understanding of the right created by the amendment. Rakove flatly rejects the position adopted by the Court in *Heller*.⁶⁶

In his dissenting opinion in *Heller*, Justice Stevens outlined the narrower reading of the Second Amendment, focused on military uses of firearms; he provided numerous and detailed references to the primary and secondary materials.⁶⁷ The much more important point is that many historians believe that he is right. The *Heller* Court itself relied on numerous academic writings by law professors, as did Justice Breyer’s dissenting opinion,⁶⁸ but few members of that group are trained historians. More commonly, they are advocates with a rooting interest in one or another position. There is a marked difference (in my view) between the care, sensitivity to context, and relative neutrality generally shown by historians and the advocacy-oriented, conclusion-driven, and often tendentious treatments characteristic of academic lawyers on both sides of the Second Amendment debate. As Rakove writes:

[H]istorical operations in the Second Amendment theater of combat are often mounted by campaigners not intimately familiar with the terrain. These are raiders who know what they are looking for, and having found it, they care little about collateral damage to the surrounding countryside that historians better know as context.⁶⁹

Law office history plays a large role in the law reviews and, thanks to *Heller*, in the pages of the United States Reports. To be sure, the

⁶⁵ Rakove, *supra* note 8, at 158. In the process of supporting this argument, Rakove offers a sharp challenge to influential work by academic lawyers. *See id.* at 156–59.

⁶⁶ *See id.*; *see also* Brief of Amici Curiae Jack N. Rakove et al. in Support of Petitioners, *Heller*, 128 S. Ct. 2783 (2008) (No. 07-290), *available at* http://www.abanet.org/publiced/preview/briefs/pdfs/07-08/07-290_PetitionerAmCuRakove.pdf; Posting of the New York Times to Times Topics, <http://topics.blogs.nytimes.com/2008/06/26/qa-jack-rakove-on-heller-and-history> (June 26, 2008 18:55); Rakove, *supra* note 39.

⁶⁷ *Heller*, 128 S. Ct. at 2831–42 (Stevens, J., dissenting).

⁶⁸ *See id.* at 2789, 2795, 2798–99, 2803, 2820 (majority opinion); *id.* at 2848–49, 2866 (Breyer, J., dissenting).

⁶⁹ Rakove, *supra* note 8, at 105.

competing arguments by the Court and Justice Stevens are impressively detailed. But the subtlety, nuance, acknowledgement of counterarguments, and (above all) immersion in Founding-era debates, characteristic of good historical work, cannot be found in *Heller*.

This should not be a surprise. No member of the Court is a historian. None can claim to be anything like a true specialist in the Founding period.⁷⁰ In these circumstances, it is more than a little disturbing to find that the most conservative members of the Court concluded, apparently with great confidence, that the Second Amendment creates an individual right to have guns for nonmilitary purposes, whereas the less conservative members of the Court concluded, apparently with equal confidence, that the Second Amendment does no such thing. *Heller* is plausibly taken as a great triumph less for historical recovery than for a social movement determined to create a robust individual right to have guns.⁷¹

At the same time, it must be acknowledged that the analogy to *Lochner* is highly imperfect, at least if we see *Lochner* as a case that was wrong because it so plainly defied the original meaning. The *Lochner* Court did not take pains to defend its decision in textual and historical terms, and it is most doubtful that the decision could be so defended. By contrast, *Heller* offers ample detail on the original meaning, and *Heller* could be so defended, notwithstanding the existence of intense debate. For this reason, the analogy to *Lochner* seems to fail if we understand the analogy to be based on a judgment that the twentieth-century Court flagrantly departed from originalist methodology, properly applied.

B. Thayerism and *Lochnerism*

It is not standard, however, to say that the flaw of *Lochner* was that it departed from originalism. Let us understand *Lochner* in a different way, one that invokes one of the greatest and most influential essays in the history of American law (and one that has received a prominent and powerful modern defense⁷²). In that essay, James Bradley Thayer argues that courts should uphold national legislation unless it is plainly and unambiguously in violation of the Constitution.⁷³ Thayer notes that because the American Constitution is often

⁷⁰ This point raises a general problem for originalism: if the Constitution is to be construed in accordance with the original public meaning, there is a serious question as to whether lawyers are competent for the task.

⁷¹ See Siegel, *supra* note 44.

⁷² See ADRIAN VERMEULE, JUDGING UNDER UNCERTAINTY: AN INSTITUTIONAL THEORY OF LEGAL INTERPRETATION (2006).

⁷³ See James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129 (1893).

ambiguous, those who decide on its meaning must inevitably exercise discretion. Laws that “will seem unconstitutional to one man, or body of men, may reasonably not seem so to another[, because] the constitution often admits of different interpretations; . . . there is often a range of choice and judgment.”⁷⁴ In Thayer’s view, “whatever choice is rational is constitutional.”⁷⁵

Thayer’s argument, in brief, is that courts should strike down laws only “when those who have the right to make laws have not merely made a mistake, but have made a very clear one, — so clear that it is not open to rational question.”⁷⁶ The question for courts “is not one of the mere and simple preponderance of reasons for or against, but of what is very plain and clear, clear beyond a reasonable doubt.”⁷⁷ In so arguing, Thayer emphasizes two points. The first is the fallibility of federal judges. When judges conclude that a law is unconstitutional, they are of course relying on their own interpretation, and they might be wrong. Judges are learned in the law, certainly. But should we conclude that judicial interpretations are necessarily correct?

Thayer’s second point is that a strong judiciary might harm democracy itself. He suggests that if judges become too aggressive, the moral vigilance of elected officials might weaken. Thayer laments that “our doctrine of constitutional law has had a tendency to drive out questions of justice and right, and to fill the minds of legislators with thoughts of mere legality, of what the constitution allows.”⁷⁸ Indeed, things have often been worse, for “even in the matter of legality, they have felt little responsibility; if we are wrong, they say, the courts will correct it.”⁷⁹ Thayer seeks to place the responsibility for justice on democracy, where it belongs. “Under no system can the power of courts go far to save a people from ruin; our chief protection lies elsewhere.”⁸⁰ Modern Thayerians might well emphasize this point in the context of the Second Amendment as elsewhere, suggesting that regulation of guns raises complex moral and pragmatic considerations that should be engaged directly, not as a matter of “mere legality.”

On a Thayerian view, the problem with the *Lochner* decision was that the Court invalidated legislation even though the constitutional infirmity was far from plain. On this view, *Heller* runs into exactly the same problem. We have seen that reasonable people, including reasonable historians, fiercely debate the meaning of the Second Amend-

⁷⁴ *Id.* at 144.

⁷⁵ *Id.*

⁷⁶ *Id.*

⁷⁷ *Id.* at 151.

⁷⁸ *Id.* at 155.

⁷⁹ *Id.* at 155–56.

⁸⁰ *Id.* at 156.

ment and that the view defended by Justice Stevens — that the right extends only to military uses of guns — is hardly without support.⁸¹ In these circumstances, Thayerians will insist that the Court owed a duty of respect to a democratic judgment.

C. *Guns, Carolene Products, and Politics*

It is true that the Thayerian reading of *Lochner* cuts very broadly, and, for most observers, unacceptably so. If Thayer was right, *Heller* is surely wrong, but the same must be said about many other decisions accepted by most of *Heller*'s likely critics, including (for example) *Brown v. Board of Education*⁸² (banning racial segregation), *Califano v. Goldfarb*⁸³ (striking down sex discrimination), and *Boumediene v. Bush*⁸⁴ (vindicating the right to habeas corpus). Almost no one is a universal Thayerian.⁸⁵ If *Heller* is to be treated as a modern incarnation of *Lochner* for less-than-universal Thayerians, then we must specify a less-than-universal domain for Thayerism, one that would reject both decisions, but allow a more aggressive judicial approach in many areas. In the most famous footnote in all of constitutional law, the Court suggested such a possibility in *United States v. Carolene Products Co.*,⁸⁶ indicating that a more aggressive approach would be justified when there was some kind of defect in majoritarian processes.⁸⁷ John Hart Ely's *Democracy and Distrust*⁸⁸ elaborates an approach of this kind, which is supported by an illuminating footnote from Justice Stevens as well.⁸⁹

⁸¹ CORNELL, *supra* note 8; Rakove, *supra* note 8. The existence of ambiguity and reasonable disagreement underpins Judge Wilkinson's claim that *Heller* is closely analogous to *Roe*. See Wilkinson, *supra* note 58.

⁸² 347 U.S. 483 (1954).

⁸³ 430 U.S. 199 (1977).

⁸⁴ 128 S. Ct. 2229 (2008).

⁸⁵ The word "almost" is necessary because of VERMEULE, *supra* note 72.

⁸⁶ 304 U.S. 144 (1938).

⁸⁷ *Id.* at 153 n.4 ("[P]rejudice against discrete and insular minorities may be a special condition, which tends seriously to curtail the operation of those political processes ordinarily to be relied upon to protect minorities, and which may call for a correspondingly more searching judicial inquiry.").

⁸⁸ ELY, *supra* note 61.

⁸⁹ *Heller*, 128 S. Ct. at 2846 n.39 (Stevens, J., dissenting) ("It was just a few years after the decision in *Miller* that Justice Frankfurter (by any measure a true judicial conservative) warned of the perils that would attend this Court's entry into the 'political thicket' of legislative districting. The equally controversial political thicket that the Court has decided to enter today is qualitatively different from the one that concerned Justice Frankfurter: While our entry into that thicket was justified because the political process was manifestly unable to solve the problem of unequal districts, no one has suggested that the political process is not working exactly as it should in mediating the debate between the advocates and opponents of gun control. . . . It is, however, clear to me that adherence to a policy of judicial restraint would be far wiser than the bold decision announced today." (citations omitted) (quoting *Colegrove v. Green*, 328 U.S. 549, 556 (1946) (plurality opinion))).

On this understanding, the Thayerian view is generally correct, but a more intrusive approach from the Court is justified (only) when the democratic process is not functioning well, in the sense that certain rights and groups are at particular risk. Perhaps an aggressive approach can be justified in (for example) sorting out ambiguities in the Equal Protection Clause in *Brown*, but not in sorting out ambiguities in the Second Amendment in *Heller*. There is no special reason for an aggressive judicial role in protecting against gun control, in light of the fact that opponents of such control have considerable political power and do not seem to be at a systematic disadvantage in the democratic process. The *Carolene Products* approach offers no support for *Heller*. Indeed, the widespread commitment to an individual right to own guns itself operates as a safeguard against excessive or unjustified gun control laws.

The *Carolene Products* approach is of course controversial, especially to those who favor the originalist methodology of *Heller*. To those who embrace originalism, judges must follow that methodology, and considerations involving deference to the democratic process, or its limits, are irrelevant. At this point, we seem to have reached a dead end. On some accounts of what was wrong with *Lochner*, *Heller* is analogous. The question is whether those accounts are correct.

IV. *HELLER* AS *GRISWOLD*

In *Griswold*, the Court protected an individual right that enjoyed broad popular support, at the expense of a law that counted as a national outlier. In *Heller*, the Court did the same thing. In *Griswold*, the Court proceeded in minimalist fashion, with its holding focusing narrowly on the law before it. The same is true of the Court's approach in *Heller*. Just as *Griswold* reflected a kind of privacy minimalism, *Heller* signals the arrival of Second Amendment minimalism. These conclusions have strong implications for the future development of Second Amendment doctrine.

A. *Rationalizing Griswold*

In *Griswold*, the Court struck down Connecticut's ban on the use of contraceptives by married couples.⁹⁰ The Court struggled mightily to find a textual source for its conclusion. It explored a range of provisions that might be seen to protect some kind of "privacy,"⁹¹ and it urged that the right to use contraceptives fell within "penumbras" or "emanations" from the Bill of Rights.⁹² But constitutional provisions

⁹⁰ *Griswold v. Connecticut*, 381 U.S. 479, 486 (1965).

⁹¹ *Id.* at 482–83.

⁹² *Id.* at 484.

have domains, not “penumbras” or “emanations,” and hence almost no one defends *Griswold* as originally written. It is an understatement to say that the Court’s analysis has not survived the test of time.⁹³

Three other rationales for *Griswold* have received respectful attention. The first, drawing on the work of Alexander Bickel, emphasizes desuetude.⁹⁴ The Connecticut law at issue was enacted long before the Court’s decision, it was not much enforced,⁹⁵ and under these circumstances, it might be taken to have “lapsed.” To be sure, a great deal of work must be done to show how this idea can be made to justify *Griswold* on constitutional grounds; no constitutional provision declares statutes invalid because they are infrequently enforced, anachronistic, or both.⁹⁶ But perhaps the Due Process Clause, in its purely procedural sense, is sufficient. Perhaps it could be said that a law violates that clause if it is so wildly out of step with prevailing social norms that its enforcement is necessarily sporadic and therefore unpredictable, in a way that compromises the rule of law.⁹⁷

The second rationale, pressed by Justice Harlan, emphasizes the grounding of substantive due process in tradition.⁹⁸ Perhaps the sanctity of marriage is honored by tradition, and perhaps the tradition, which should not be taken as static, is fatally inconsistent with the Connecticut law.⁹⁹ On this view, substantive due process is rooted in longstanding social understandings, and the tradition of respect for marital privacy requires a powerful justification for any intrusion. The underlying claim might be that courts should not be licensed to define “liberty” as they see fit, and that if a certain conception of liberty is sanctified by tradition, it has a kind of epistemic credential.¹⁰⁰

A third rationale, prominently suggested by Judge Richard Posner, is that the Connecticut law was fatally out of step with the national consensus.¹⁰¹ On this view, the *Griswold* Court was acting to vindicate that consensus against an outlier. Indeed, Justice Harlan himself invoked this point, urging that for him, the “conclusive” factor was “the utter novelty of [the state’s] enactment. Although the Federal Government and many States have at one time or other had on their

⁹³ See, e.g., *Lawrence v. Texas*, 539 U.S. 558 (2003) (understanding sexual privacy as part of liberty, and not stressing penumbras and emanations).

⁹⁴ See ALEXANDER M. BICKEL, *THE LEAST DANGEROUS BRANCH: THE SUPREME COURT AT THE BAR OF POLITICS* 148–56 (Yale Univ. Press 2d ed. 1986) (1962).

⁹⁵ See POSNER, *supra* note 12, at 325–26.

⁹⁶ See Cass R. Sunstein, *What Did Lawrence Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27, for one effort.

⁹⁷ For discussion, see *id.*

⁹⁸ See *Poe v. Ullman*, 367 U.S. 497, 542 (1961) (Harlan, J., dissenting).

⁹⁹ *Id.* at 553.

¹⁰⁰ See Cass R. Sunstein, *Due Process Traditionalism*, 106 MICH. L. REV. 1543 (2008).

¹⁰¹ See POSNER, *supra* note 12, at 329.

books statutes forbidding or regulating the distribution of contraceptives, none, so far as I can find, has made the *use* of contraceptives a crime.”¹⁰²

Here too, of course, a great deal of work would be necessary to demonstrate why and when the Due Process Clause should be construed to give authority to a national consensus or to raise serious doubts about national outliers. Perhaps the basic claim is that if a law is a genuine outlier, there is reason to doubt whether it is grounded on a firm foundation; an intrusion on liberty that lacks anything like broad support might lack epistemic credentials, simply because and to the extent that it is so unusual. On this view, Judge Posner’s approach is a close cousin of Justice Harlan’s, and it is no surprise that Justice Harlan invoked the point in the context of an opinion emphasizing the importance of tradition.

The Court itself has often rooted its analysis in Justice Harlan’s approach,¹⁰³ but Judge Posner’s understanding of *Griswold* fits well with a broader fact about the arc of constitutional law. The Court rarely points to the importance of a national consensus or suggests that it is in any sense responsive to what most people think. But the development of doctrine, over time, unquestionably shows that kind of responsiveness.¹⁰⁴ As a clear example, very much in line with this understanding of *Griswold*, consider *Lawrence v. Texas*.¹⁰⁵ In that case, the Court was even willing to invoke “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex” in invalidating a ban on same-sex sexual relations.¹⁰⁶ Both historians¹⁰⁷ and political scientists¹⁰⁸ have shown that the connections between judicial rulings and public convictions are far more pervasive than is usually thought.

Consider *Brown v. Board of Education*,¹⁰⁹ invalidating racial segregation; *Loving v. Virginia*,¹¹⁰ striking down bans on racial intermar-

¹⁰² *Poe v. Ullman*, 367 U.S. 497, 554 (1961) (Harlan, J., dissenting), *incorporated by reference* in *Griswold v. Connecticut*, 381 U.S. 479, 500 (1965) (Harlan, J., concurring in the judgment).

¹⁰³ *See, e.g.*, *Washington v. Glucksberg*, 521 U.S. 702 (1997) (refusing to recognize a right to physician-assisted suicide due to historical disapproval of the practice of assisting suicide). *But see, e.g.*, *Lawrence v. Texas*, 539 U.S. 558 (2003) (rejecting limitation of due process clause to traditional mores).

¹⁰⁴ *See* MICHAEL J. KLARMAN, FROM JIM CROW TO CIVIL RIGHTS: THE SUPREME COURT AND THE STRUGGLE FOR RACIAL EQUALITY 5 (2004); Robert A. Dahl, *Decision-Making in a Democracy: The Supreme Court As a National Policy-Maker*, 6 J. PUB. L. 279 (1957).

¹⁰⁵ 539 U.S. 558.

¹⁰⁶ *Id.* at 572.

¹⁰⁷ *See, e.g.*, KLARMAN, *supra* note 104.

¹⁰⁸ *See, e.g.*, Dahl, *supra* note 104.

¹⁰⁹ 347 U.S. 483 (1954).

¹¹⁰ 388 U.S. 1 (1967).

riage; *Reed v. Reed*,¹¹¹ inaugurating the constitutional attack on laws discriminating on the basis of sex; *Craig v. Boren*¹¹² and *United States v. Virginia*,¹¹³ cementing the ban on such laws; and *Romer v. Evans*,¹¹⁴ striking down a highly unusual Colorado state constitutional amendment precluding state or local action banning measures forbidding discrimination on the basis of sexual orientation. In these cases, and many more, it would be reasonable to suggest that the Court's decision was, in an important sense, insisting that states must obey a national consensus.

Heller can be seen in the same light. As I have noted, a strong majority of Americans now supports the individual right to own guns for nonmilitary purposes.¹¹⁵ At the same time, the law at issue in *Heller* was among the most draconian in the nation — a genuine national outlier.¹¹⁶ The *Heller* Court might be understood as reacting to the District of Columbia law in the same way that the *Griswold* Court reacted to the Connecticut law, with skepticism about an intrusion that departs so radically from the general practice and hence the national consensus. Recall here that both presidential candidates — John McCain and Barack Obama — responded to the *Heller* decision with statements reflecting their support for the Court's conclusion.

To be sure, there are significant differences between the Connecticut law at issue in *Griswold* and the District of Columbia law at issue in *Heller*. The Connecticut provision was old,¹¹⁷ making the claim of desuetude plausible. The *Griswold* Court could even have been said to have engaged in a project of “modernization,” in a way that fits with some general tendencies in constitutional law.¹¹⁸ By contrast, the District of Columbia provision was new, suggesting that the Court was not merely vindicating a national judgment, but also challenging a departure from standard understandings of appropriate gun control legislation. A doctrine that would authorize challenges to recent departures and innovations raises quite different considerations from a doctrine that merely authorizes attacks on anachronistic laws. In this respect, Bickel's understanding of *Griswold* offers no help in *Heller*.

¹¹¹ 404 U.S. 71 (1971).

¹¹² 429 U.S. 190 (1976).

¹¹³ 518 U.S. 515 (1996).

¹¹⁴ 517 U.S. 620 (1996).

¹¹⁵ See sources cited *supra* note 45.

¹¹⁶ *Heller*, 128 S. Ct. at 2818 (“Few laws in the history of our Nation have come close to the severe restriction of the District's handgun ban.”).

¹¹⁷ See POSNER, *supra* note 12, at 325. Similarly, at the time of *Lawrence*, most state anti-sodomy laws were several decades old and rarely enforced. See *Lawrence v. Texas*, 539 U.S. 558, 570, 572 (2003).

¹¹⁸ See David A. Strauss, *Modernization and Representation Reinforcement: An Essay in Memory of John Hart Ely*, 57 STAN. L. REV. 761, 762 (2004).

What I am suggesting is a more general point: *Heller* is quite similar to *Griswold* in the critical sense that both decisions operated in accordance with a national consensus at the expense of a law that counted as a sharp deviation from it.

There is a possible response here. Whenever the Court begins a new area of constitutional doctrine, its initial step is likely to be analogous to *Griswold*. One reason is sensible litigation strategy; if the goal is to convince the Court to embark on a new path, the best strategy is usually to find an outlier and ask the Court to invalidate it in a way that leaves a door for future expansion. And if the Court itself is initiating a new avenue for potential invalidations, it is likely to begin narrowly and in a way that does not fit badly with public convictions, thus providing an analogy to *Griswold*. On this view, *Griswold* is likely to be the near-universal analogy whenever the Court embarks on a new path.

This response might be right, but it is not exactly an objection. If it is right, it suggests a general point of considerable interest. It is true that minimalism (at least in the sense of narrowness), alongside consistency with national commitments and invalidation of outliers, is a common starting point for doctrinal innovation. But if this point holds true for *Heller*, it suggests that despite its length and ambition, and its explicit originalism, the ruling fits with a number of decisions, most conspicuously *Griswold*, in which a new departure was drawn in narrow terms that fit well with public convictions.

It is also true that the District of Columbia law at issue in *Heller* could have been overridden by Congress at any time, unlike many state enactments. If Congress enacts a law that intrudes on privacy, or that regulates guns, it would be singularly odd to invalidate that law as a “national outlier.” But there is a large difference between a national enactment from Congress and an enactment governing the District of Columbia. The latter reflects political pressures and dynamics that are not genuinely national, but unique to the District. When Congress fails to override the law of the District, its inaction cannot plausibly be taken as a reflection of national will. In these circumstances, it is perfectly legitimate to treat legislation for the District as a kind of state law, and to conclude that for better or for worse, it may indeed count as a national outlier.

B. Questions and Puzzles

Of course, this understanding of the Court’s role raises many questions and doubts. The first is empirical: what mechanisms link constitutional doctrine to a national consensus? The most obvious answer involves the appointments process. That process ensures that the

views of the Justices have some connection to political will.¹¹⁹ Justices also live in society and are inevitably influenced by what other people in society think.¹²⁰ While judicial rulings are hardly a direct product of public opinion, there are clear links between what Justices do and what the public believes.¹²¹ Notwithstanding the Court's emphasis on what it took to be the original understanding of the Second Amendment, *Heller* is a clear example of these links.

There are also normative questions: Why does a national consensus matter? Why is it relevant to the Due Process Clause, the Equal Protection Clause, the Second Amendment, or anything else? Why and when should the Court strike down national outliers, rather than permitting them as a form of legitimate and even desirable experimentation? As I have suggested, the consensus may have epistemic value; if most people believe that *X* is true, *X* may well be true, certainly under favorable conditions. At least it might be said that if, in a democratic society, a national consensus supports some kind of individual right to own guns, the risks associated with recognition of that right are less likely to be terribly high. For purposes of law, the relevance of this point depends on the appropriate theory of constitutional interpretation.¹²² Originalists will be puzzled about the idea that a national consensus matters unless the original understanding suggests that it does.

There are also legitimate questions about federalism, experimentation, and divergent norms. Certainly national outliers cannot be said to be invalid as such. Suppose that the District of Columbia seeks to embark on a path that differs from that of Montana and Georgia, or for that matter that is unique or nearly so. Should we not acknowledge the possibility (likelihood!) that it is responding to the distinctive values and information of its own citizens and representatives, in a way that deserves respect? Today's outlier is often tomorrow's norm. But prominent theories of interpretation do make a place for public will, most plausibly on the theory that at least in some domains, widespread social convictions convey information about the proper content of rights.¹²³ Indeed, judicial reliance on such convictions might even

¹¹⁹ See Dahl, *supra* note 104, at 284–86.

¹²⁰ See CASS R. SUNSTEIN, A CONSTITUTION OF MANY MINDS (forthcoming 2009).

¹²¹ See Dahl, *supra* note 104, at 284–85; cf. PUBLIC OPINION AND CONSTITUTIONAL CONTROVERSY 8–9 (Nathaniel Persily et al. eds., 2008) (discussing the effects of Supreme Court decisions on public opinion).

¹²² Related issues are discussed in detail in SUNSTEIN, *supra* note 120.

¹²³ See, e.g., Harry H. Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 284 (1973) (“The Court’s task is to ascertain the weight of the principle in conventional morality and to convert the moral principle into a legal one by connecting it with the body of constitutional law.”).

be counted as a form of “popular constitutionalism.”¹²⁴ Both *Griswold* and *Heller* (and *Brown*, and *Lawrence*, and *Reed*, among many others) can be seen as reflections of popular constitutionalism, even if the *Heller* Court hardly spoke in those terms.

Even if it is correct to see *Heller* as a reflection of national convictions, a related problem remains: Could the Court have defended its opinion in the terms sketched here? Could it have done so in *Griswold*? Surely it is revealing that the Court did not attempt to do so in either case — and that it is unusual for the Court to acknowledge the relevance of the national consensus.¹²⁵ Suppose that we accept the publicity principle, in accordance with which public institutions should not root their judgments in considerations that they could not defend in public.¹²⁶ If so, the Court ought not to resolve cases by reference to arguments that it could not justify publicly. The only possible response to this objection is that in at least some variation, the approach I am sketching could indeed be offered by the Court.¹²⁷ In fact, I am willing to predict that in some domains, it will be offered in the future. And even when a national consensus is not explicitly invoked, it is often at work.

There is an important historical difference to be pondered as well. *Heller* is the product of a mature current of constitutional thought, spurred not only by private groups, but also by committed academics. This current of thought has become prominent in national politics and culture and, by 2008, had established itself as thoroughly mainstream.¹²⁸ In sharp contrast, *Griswold* was the result of an early effort by an incipient movement for reproductive rights and sex equality, and this movement had yet to become highly visible on the nation’s cultural viewscreen.¹²⁹ In this sense, *Heller* has far more in common with *Brown* than with *Griswold* — in the particular sense that *Brown*, like *Heller*, was the culmination of a long process of advocacy, in a self-

¹²⁴ See LARRY D. KRAMER, *THE PEOPLE THEMSELVES: POPULAR CONSTITUTIONALISM AND JUDICIAL REVIEW* (2004).

¹²⁵ The Court occasionally does refer to such a consensus in the Eighth Amendment context, see, e.g., *Kennedy v. Louisiana*, 128 S. Ct. 2641, 2650–53 (2008); *Roper v. Simmons*, 543 U.S. 551, 564 (2005), but the word “unusual” in the amendment provides a textual hook for that approach in these cases. See also *Lawrence v. Texas*, 539 U.S. 558 (2003) (considering the general practice of states in reaching the conclusion that the Texas anti-sodomy law was unconstitutional).

¹²⁶ See JOHN RAWLS, *A THEORY OF JUSTICE* 133, 453–54 (1971).

¹²⁷ Cf. *Lawrence*, 539 U.S. at 571–72 (“[O]ur laws and traditions in the past half-century . . . show an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”); *Romer v. Evans*, 517 U.S. 620, 682–83 (1996) (emphasizing the unusual nature of the provision that the Court invalidated).

¹²⁸ See Siegel, *supra* note 44.

¹²⁹ See JOHN W. JOHNSON, *GRISWOLD V. CONNECTICUT: BIRTH CONTROL AND THE CONSTITUTIONAL RIGHT OF PRIVACY* (2005).

conscious effort to entrench a certain understanding of the Constitution in the interest of social reform.¹³⁰ In short, *Heller* and *Griswold* have distinctive sociologies. While the two were both responsive to public convictions, their cultural backdrops were radically different.

Finally, there are questions of judicial competence: How will the Court identify the national consensus, if it is relevant? Ought the Justices to consult opinion polls? To survey state law? I cannot answer such questions here. The goal is to understand *Heller*, not to defend it. My principal suggestion is that in its vindication of a national commitment against a provision that starkly departed from it, *Heller* is closely analogous to *Griswold*.

C. *Heller's Minimalism*

Minimalists favor small steps, and they reject wide rulings and theoretical ambition. In the end, *Griswold* was a conspicuously minimalist opinion.¹³¹ This is so in the sense that it did not adopt a theoretically ambitious understanding of privacy or offer a great deal of guidance about the scope of the right. Despite its rhetoric, the Court took a small step and narrowly focused on the particular provision at issue. The holding involved the right to use contraceptives within marriage. The Court did not resolve or even speak to the question of whether there is a right to purchase contraceptives within marriage, whether any right to use or purchase contraceptives applies outside of marriage, or whether any such right is part of a right to sexual activity as such. And notwithstanding its apparent sweep, the *Heller* Court's opinion had unmistakable minimalist elements. To be sure, the opinion displays a high degree of theoretical depth; with its explicitly originalist path, the Court adopted a particular method and did not seek an incompletely theorized agreement on its approach.¹³² But the Court focused the key parts of its analysis on the particular provisions at issue.¹³³ Indeed, the ruling itself was exceedingly narrow. Moreover, the Court left numerous questions undecided.

Most obviously, the Court suggested that the Second Amendment right has clear limitations. In the Court's words, "nothing in our opinion should be taken to cast doubt on longstanding prohibitions on the possession of firearms by felons and the mentally ill, or laws forbidding the carrying of firearms in sensitive places such as schools and

¹³⁰ For a history of the social reform movement leading up to *Brown*, see RICHARD KLUGER, *SIMPLE JUSTICE: THE HISTORY OF BROWN V. BOARD OF EDUCATION AND BLACK AMERICA'S STRUGGLE FOR EQUALITY* (2d ed. 2006).

¹³¹ For a definition of minimalism, see CASS R. SUNSTEIN, *ONE CASE AT A TIME: JUDICIAL MINIMALISM ON THE SUPREME COURT* ix–xi (1999).

¹³² On the distinction between shallowness and narrowness, see *id.* at 16–19.

¹³³ *Heller*, 128 S. Ct. at 2817–19.

government buildings, or laws imposing conditions and qualifications on the commercial sale of arms.”¹³⁴ To this the Court added that “the sorts of weapons protected [by the amendment] were those ‘in common use at the time.’”¹³⁵ In its view, “that limitation is fairly supported by the historical tradition of prohibiting the carrying of ‘dangerous and unusual weapons.’”¹³⁶ It follows that certain unusual or especially dangerous weapons, such as sawed-off shotguns, are also outside the domain of the Second Amendment. In these ways, the Court specified the validity of a number of actual or imaginable limitations on the right.

To be sure, these disclaimers are not, precisely, a form of minimalism; they do not leave the nature of the right unclear. They trim, rather than refuse to decide.¹³⁷ But the Court acknowledged that its decision was, in some respects, quite narrow and that much remains to be resolved. After offering an account of measures on which it did not mean to cast doubt, the Court added an important footnote: “We identify these presumptively lawful regulatory measures only as examples; our list does not purport to be exhaustive.”¹³⁸ In addition, the Court was sensitive to Justice Breyer’s objection that its ruling left a great deal open: “[S]ince this case represents this Court’s first in-depth examination of the Second Amendment, one should not expect it to clarify the entire field.”¹³⁹ To support this point, the Court referred to its first decision involving religious liberty, *Reynolds v. United States*,¹⁴⁰ acknowledging, with understatement and an unmistakable dose of irony, that the Court’s ruling there did not “[leave] that area in a state of utter certainty.”¹⁴¹

Notwithstanding the Court’s emphasis on historical markers, it is emphatically true that *Heller* leaves many questions open. To be sure, the Court squarely rejected the case-by-case interest balancing urged by Justice Breyer.¹⁴² But consider three fundamental issues that the Court did not resolve. First, the Court did not decide whether the Second Amendment is incorporated by the Fourteenth Amendment and thus made applicable to the states.¹⁴³ Second, the Court did not

¹³⁴ *Id.* at 2816–17 (footnote omitted).

¹³⁵ *Id.* at 2817 (quoting *United States v. Miller*, 307 U.S. 174, 179 (1939)).

¹³⁶ *Id.* at 2817 (quoting 4 WILLIAM BLACKSTONE, COMMENTARIES *148–49).

¹³⁷ See Cass R. Sunstein, *Trimming*, 122 HARV. L. REV. (forthcoming Feb. 2009).

¹³⁸ *Heller*, 128 S. Ct. at 2817 n.26.

¹³⁹ *Id.* at 2821.

¹⁴⁰ 98 U.S. 145 (1879).

¹⁴¹ *Heller*, 128 S. Ct. at 2821.

¹⁴² *Id.* (citing *id.* at 2852 (Breyer, J., dissenting)).

¹⁴³ In an opaque passage, the Court said, “With respect to [the nineteenth-century case of *United States v. Cruikshank*’s continuing validity on incorporation, a question not presented by this case, we note that *Cruikshank* also said that the First Amendment did not apply against the States and did not engage in the sort of Fourteenth Amendment inquiry required by our later

settle on a level of scrutiny for restrictions on the Second Amendment right.¹⁴⁴ Third, the Court did not come close to specifying the scope of the right. We know that “dangerous and unusual weapons” can be forbidden, and this idea undergirds the conclusion that “the sorts of weapons protected were those ‘in common use at the time.’” But how, precisely, does this idea bear on modern questions, especially in light of the fact that the weapons at issue are necessarily modern ones?

The Court’s answer here is opaque: “And there will be time enough to expound upon the historical justifications for the exceptions we have mentioned if and when those exceptions come before us.”¹⁴⁵ Rejecting interest-balancing, the Court did say that the Second Amendment “elevates above all other interests the right of law-abiding, responsible citizens to use arms in defense of hearth and home.”¹⁴⁶ But what exactly does that abstract phrase mean? How will it be specified in the future? Is interest-balancing appropriate or mandatory outside of the home? The Court did not say.

D. Evaluating *Heller* As *Griswold*

We have seen that on purely originalist grounds, the question resolved in *Heller* was not straightforward, and reasonable people believe that the Court was wrong.¹⁴⁷ In these circumstances, the Court might have used two tiebreakers. First, it might have emphasized the importance of respecting longstanding practices by federal and state legislatures and by federal courts, which seemed to suggest that the Second Amendment right is limited to military uses of guns. That understanding of the amendment was reflected in numerous lower federal court decisions, so much so as to represent an entrenched view.¹⁴⁸ The same view seems to fit with many legislative practices as well.¹⁴⁹ For followers of Edmund Burke, who believe less in the original meaning than in the need to follow social understandings over time,¹⁵⁰ the legislative and judicial practices might well have been invoked to reject a right to use guns for nonmilitary purposes.

Second, the Court might have concluded that, for Thayerian reasons, the democratic process should be given room to maneuver, at

cases. Our later decisions in *Presser v. Illinois*, 116 U.S. 252, 265 (1886), and *Miller v. Texas*, 153 U.S. 535, 538 (1894), reaffirmed that the Second Amendment applies only to the Federal Government.” *Heller*, 128 S. Ct. at 2813 n.23 (parallel citations omitted).

¹⁴⁴ *Id.* at 2817–18, 2821.

¹⁴⁵ *Id.* at 2821.

¹⁴⁶ *Id.*

¹⁴⁷ See TUSHNET, *supra* note 8 (suggesting that reasonable arguments exist on both sides).

¹⁴⁸ See the recitation in Justice Stevens’s dissenting opinion. *Heller*, 128 S. Ct. at 2823 n.2 (Stevens, J., dissenting).

¹⁴⁹ See TUSHNET, *supra* note 8, at 73–126.

¹⁵⁰ See Cass R. Sunstein, *Burkean Minimalism*, 105 MICH. L. REV. 353 (2006).

least in the face of reasonable doubt. Without any particular democratic malfunction specially justifying judicial intervention — for example, without any kind of claim on the basis of *Carolene Products* — a Thayerian approach would have had considerable appeal. Such an approach receives additional support from the fact that *Heller* will inevitably require federal courts, with limited guidance from *Heller* itself, to play an exceedingly difficult role in assessing the predictably numerous challenges to gun control legislation. Perhaps the Court should have adopted a militia-focused interpretation of the Second Amendment that was, at the least, textually and historically plausible, and that would prevent the federal judiciary from entering an unusual political thicket in which the democratic process does not seem to be working poorly.

There is, however, an important countervailing consideration. For the last decades, and perhaps for much longer, a robust individual right to use guns has become an entrenched part of American culture.¹⁵¹ Many Americans believe that this right is both fundamental and essential — as much so, in its way, as the right to freedom of speech. They believe that the right to have guns is a crucial safeguard against private threats and even against government itself. Gun ownership is, for them, the ultimate form of security — an essential part of their identity and self-understanding.¹⁵² About forty million Americans — more than one in eight — are gun owners.¹⁵³ In these circumstances, it is no light thing for the Supreme Court to announce that tens of millions of Americans are simply mistaken, and that they hold their guns only at the government's sufferance.

Of course, it is legitimate to ask whether this consideration is important or even relevant. Should the Supreme Court interpret the Constitution to create rights simply because people understand the Constitution to create rights — and would be offended or worse if the Court failed to do so? After all, the Court did not recognize a right to Social Security benefits,¹⁵⁴ or to obscene materials,¹⁵⁵ or to certain kinds of property protection,¹⁵⁶ even though millions of Americans insist, with great conviction, that they have such rights. But the right to

¹⁵¹ For different but illuminating perspectives, see JOAN BURBICK, *GUN SHOW NATION: GUN CULTURE AND AMERICAN DEMOCRACY* (2006); and CORNELL, *supra* note 8.

¹⁵² Cf. Dan M. Kahan & Donald Braman, *More Statistics, Less Persuasion: A Cultural Theory of Gun-Risk Perceptions*, 151 U. PA. L. REV. 1291 (2003) (arguing that an individual's beliefs about gun control derive from her wider cultural worldview).

¹⁵³ Christine Cadena, *Presidential Campaign Platforms 2008: The Issues of Gun Control*, ASSOCIATED CONTENT, July 2, 2007, http://www.associatedcontent.com/article/294410/presidential_campaign_platforms_2008.html.

¹⁵⁴ See *Flemming v. Nestor*, 363 U.S. 603 (1960).

¹⁵⁵ See *Miller v. California*, 413 U.S. 15 (1973).

¹⁵⁶ See *Kelo v. City of New London*, 545 U.S. 469 (2005).

have guns is different. It has a unique status in contemporary American culture; it has been recognized as a right, and with great intensity, by citizens and politicians of both parties. An interpretation of the Founding document that denied the right would likely create forms of public outrage, political polarization, and social disruption that have not been seen in many decades. Out of respect for the intensely felt convictions of millions of Americans, and with concern for the risks of potential disruption, perhaps the Court should hesitate before denying the right.

In these circumstances, *Heller* starts to look even more like *Griswold*; recall that the latter case involved the right to marital intimacy, which (not to put too fine a point on it) is also understood to be fundamental by millions of Americans. In many ways, *Heller* may be no less defensible than *Griswold* on the ground I am exploring. As I have emphasized, it is certainly true that the Court did not write in these terms, and it would be speculative in the extreme to suggest that any member of the Court even thought about the Second Amendment question in this way. I am not contending that the explanation I am offering is ultimately sufficient. In the end, however, I believe that this explanation provides the strongest basis for understanding what made *Heller* possible — and it also offers a ground for seeing what makes *Heller* appealing.

V. A BRIEF NOTE ON IMPLICATIONS

What might be expected for the future? The three analogies offer competing answers. If *Marbury*, understood in originalist terms, provides the right analogy, then we should expect courts to follow an emphatically historicist course, in which the goal of judges, acting as amateur historians, is to transplant the original understanding to modern problems. This approach is consistent with the thrust of *Heller* itself, but it presents serious conceptual problems.¹⁵⁷ It is possible that the originalist inquiries, undertaken in radically different circumstances, will mask judgments that have a pragmatic component and that are driven by a sense of consequences and justifications. The more general point is that if *Marbury*, as understood here, is the analogy, the text, interpreted in light of the history, will be the actual as well as articulated foundation for future decisions, and the scope of the Second Amendment right will turn on history.

If *Heller* is to be a rerun of *Lochner*, then we should expect serious and continuing conflicts between the Court and the political process,

¹⁵⁷ See SUNSTEIN, *supra* note 40, at 68–71.

with a series of politically controversial invalidations.¹⁵⁸ If the Court does not track but instead defies popular convictions, the *Lochner* analogy will be closer. To be sure, it is not imaginable that the Second Amendment will be taken to create the same kinds of obstacles to democratic initiatives as did the Due Process Clause in the *Lochner* era, if only because the scope of the Second Amendment is so much more limited. But it is at least imaginable that judicial invalidations of gun control laws will be frequent in the next decade and beyond.

If the analogy to *Griswold* holds, the path of the Second Amendment right will be similar to the path of the privacy right. Despite the *Heller* Court's emphatic rejection of interest balancing, we should expect a long series of case-by-case judgments, highly sensitive to particulars. The law will follow a minimalist path. Many judges will speak in originalist terms, but contemporary reason and sense, as the judges understand them, will play crucial roles. If *Heller* is analogous to *Griswold*, the Court will not use the Second Amendment aggressively as a basis for striking down many gun control laws. Instead it will proceed cautiously, upholding most of the laws now on the books and invalidating only the most draconian limitations. It is very early, to be sure, but thus far, the lower courts are taking exactly this path.¹⁵⁹

It should go without saying that, as with the right to privacy, judicial appointments will be crucial. After all, if *Bush v. Gore*¹⁶⁰ had been decided differently, it is most likely that *District of Columbia v. Heller* would have been decided differently as well.¹⁶¹

VI. CONCLUSION

Heller is the most explicitly and self-consciously originalist opinion in the history of the Supreme Court. Taken at face value, its oldest salient precursor seems to be *Marbury*, in which the Court also rested its decision on constitutional text and structure. I do not believe, however, that *Heller* can be adequately understood in this way. The relevant materials are ambiguous rather than clear; no member of the Court is a trained historian, and much of its opinion sounds like advo-

¹⁵⁸ I am greatly oversimplifying the *Lochner* era here. Although the Court did strike down important legislation, it also allowed considerable room for the police power. For discussion, see GEOFFREY R. STONE ET AL., CONSTITUTIONAL LAW 741–68 (5th ed. 2005).

¹⁵⁹ See, e.g., *United States v. Garnett*, No. 05-CR-20002-3, 2008 WL 2796098 (E.D. Mich. July 18, 2008); *Mullenix v. Bureau of Alcohol, Tobacco, Firearms & Explosives*, No. 5:07-CV-154-D, 2008 WL 2620175 (E.D.N.C. July 2, 2008); *United States v. Dorosan*, No. 08-042, 2008 WL 2622996 (E.D. La. June 30, 2008).

¹⁶⁰ 531 U.S. 98 (2000).

¹⁶¹ If the arc of constitutional history is a guide, judicial appointments are only a part of the picture; perceived public convictions matter as well. See KLARMAN, *supra* note 104; Dahl, *supra* note 104.

cacy or law office history;¹⁶² in the historical debate, the *Heller* opinion might have been wrong. In any event, it remains necessary to explain what made it possible for *Heller* to be issued in 2008, when it would not have been imaginable in 1958, 1968, 1978, or even 1988.

Skeptics will be tempted to see *Heller* as a triumph of politics and a defeat for law. On their view, the Court's detailed exploration of text and history is a smokescreen for a position that has been pressed hard by interest groups and political activists, that the Republican Party enthusiastically endorses, and that Republican appointees are likely to find congenial. If this view is correct, the most salient precursor is not *Marbury* but *Lochner*. This view can claim support from the fact that the Court was split along ideological lines; the most conservative members of the Court accepted the robust understanding of the Second Amendment right. But purely on the original understanding, *Heller* stands on plausible grounds — far more so than did *Lochner*. The Court did not, and could not, defend the invalidation of maximum hour laws by reference to text, structure, and history. At the very least, the *Heller* Court made a sustained effort to do so. If the flaw of *Lochner* consists in the Court's invocation of ambiguous constitutional text to strike down legislation, then *Heller* is indeed close to *Lochner*. But few people believe that it is always illegitimate for the Court to strike down legislation when the relevant provision of the Constitution is ambiguous. To be sure, *Lochner* and *Heller* will seem closely analogous to those who believe in a democracy-reinforcing approach to judicial review.

At first glance, it is jarring to suggest that *Heller* is a modern counterpart to *Griswold*. The two decisions seem to come from different jurisprudential universes. In originalist terms, there is nothing like a simple or clear defense of *Griswold*, and it would not be possible to produce a *Heller*-style opinion on its behalf. Nonetheless, the two rulings have a great deal in common. Both were made possible by a national consensus, which they simultaneously reflected. Both struck down a law that amounted to a national outlier. Despite their sweeping rhetoric, both had important minimalist features, ensuring that the content of the relevant right will be specified over time. It is clear that as it has developed, the right to privacy has had a great deal to do with contemporary convictions, not with the judgments of those long dead. Notwithstanding *Heller*'s barely qualified originalism,¹⁶³ I be-

¹⁶² Consider Jack Rakove's suggestion that "neither of the two main opinions in *Heller* would pass muster as serious historical writing." Rakove, *supra* note 39.

¹⁶³ See the Court's notation:

Some have made the argument, bordering on the frivolous, that only those arms in existence in the 18th century are protected by the Second Amendment. We do not interpret constitutional rights that way. . . . [T]he Second Amendment extends, *prima facie*, to all

lieve that the same will prove true of the right to bear arms. We have entered a period of Second Amendment minimalism.

instruments that constitute bearable arms, even those that were not in existence at the time of the founding.
Heller, 128 S. Ct. at 2791–92. It is not clear, of course, that this passage is properly counted as a qualification of originalism.